STATE OF MICHIGAN

COURT OF APPEALS

CLAUDE MCMANUS,

Plaintiff-Appellant,

v

KEVIN M. TOLER,

Defendant/Third-Party Plaintiff-Appellee,

v

VALERIE MCMANUS-ZOERHOF,

Third-Party Defendant.

UNPUBLISHED
April 8, 2014

No. 312277
Kent Circuit Court
LC No. 09-001778-CZ

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

In this contract dispute, following a bench trial, plaintiff Claude McManus appeals by right the order entering judgment in his favor in the amount of $71,096 against defendant/third-party plaintiff Kevin M. Toler.[1] McManus argues he was entitled to judgment in the amount of $250,802. For the reasons described below, we affirm.

The present dispute originated in 2002 when McManus sold his American Express Financial Advisors, Inc. (AEFA) franchise to Toler and McManus-Zoerhof (McManus's daughter) for the purchase price of $300,000. At that time, McManus-Zoerhof lacked the necessary licenses to own and operate an AEFA franchise and, for this reason, the agreed upon sale transferred the franchise in its entirety to Toler, with McManus-Zoerhof obtaining a contingent interest in the business dependent on her licensing exams. The agreement was memorialized in a memorandum signed by McManus, Toler, and McManus-Zoerhof. After

[1] The trial court also entered a judgment in Toler's favor against third-party defendant Valerie McManus-Zoerhof in the amount of $71,096. This award has not been challenged, and McManus-Zoerhof is not a party to this appeal.

AEFA approved the sale, all clients were transferred into Toler's name, and McManus-Zoerhof and Toler began making payments toward the purchase price.

In 2003, Toler and McManus-Zoerhof entered into an addendum to the original contract, setting specific requirements and deadlines for McManus-Zoerhof's needed licensing. McManus-Zoerhof failed to satisfy these requirements and, in June of 2004, Toler and McManus-Zoerhof terminated their business relationship. Toler divided the franchise with McManus-Zoerhof. Thereafter, they operated two separate businesses from what had once been a single franchise. They agreed that they each remained responsible for half of the original purchase price. Starting in June of 2004, McManus-Zoerhof and Toler began to make their payments to McManus individually.

In 2005, McManus and McManus-Zoerhof challenged the validity of 2002 memorandum, arguing it did not constitute a legally enforceable contract and sought to reclaim the franchise from Toler. The trial court concluded that there was a valid contract between the parties and that it had not been breached by Toler. On appeal, this Court affirmed. *McManus v Toler*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket No. 274407). Relevant to the present appeal, the panel explained that, as a result of the 2002 agreement, Toler obtained a 100 percent interest. *Id.* at 9 n 15. That is, "the franchise was being transferred or sold for $300,000 to Toler and McManus-Zoerhof jointly; however, the interest acquired by McManus-Zoerhof was contingent in nature based on licensing requirements and was subject to the possibility that it might not vest if the licenses were not obtained." *Id.* at 7.

Following this Court's decision, based on our conclusion that Toler obtained a 100 percent interest, McManus-Zoerhof ceased making payments to McManus and McManus refunded McManus-Zoerhof's previous payments by applying those sums to attorney fees she incurred in the previous litigation. Toler made his last payment on what he viewed as his half of the debt in August of 2007. In February of 2009, McManus filed the current lawsuit, seeking to recover the remaining principal owed on the purchase price, as well as interest on that sum. He maintained that Toler bears sole responsibility for the entire purchase price under the original 2002 agreement and that any sums paid by McManus-Zoerhof cannot be credited toward the purchase price. The trial court disagreed, entering a judgment against Toler for the remaining purchase price but crediting Toler with those amounts paid by McManus-Zoerhof, for a final judgment against Toler in the amount of $71,096. On appeal, McManus argues that the trial court erred in crediting Toler with sums paid by McManus-Zoerhof toward the debt.

Following a bench trial, this Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* In comparison, a trial court's conclusions of law in a bench trial are reviewed de novo. *Id.* Questions involving the proper interpretation of a contract are also reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

In this case, by virtue of this Court's 2008 decision, this Court has, to some extent, already examined the contractual relationships and obligations created by the 2002 agreement and the 2003 addendum thereto. In fact, it is this Court's previous decision which forms the

basis for McManus's contention that he and McManus-Zoerhof have no contractual relationship and that she had no financial obligation to him under the original 2002 contract. This assertion, however, runs contrary to the plain language of the 2002 document and it misconstrues this Court's previous decision.

The role of the judiciary is to enforce contracts as written. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Thus, we afford words their plain and ordinary meaning, and parol evidence may not be admitted to vary terms of a contract which are clear and unambiguous. *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Extrinsic evidence may be used, however, to ascertain the parties' intent when the contract "is expressed in short and incomplete terms, or is fairly susceptible of two constructions, or where the language employed is vague, uncertain, obscure, or ambiguous . . . ." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003) (citation and quotation marks omitted).

In this case, the 2002 written agreement is quite brief, providing merely that: "Effective 9/4/02 I am transferring/selling my practice and OSJ to Kevin Toler and jointly/subsequently with Valerie McManus (upon completion of her licenses). Sum of $300,000.00." The complete payment terms were settled later in 2003 discussions among the parties. Contrary to McManus's argument on appeal, the original written agreement plainly demonstrates the existence of a contractual relationship between McManus and McManus-Zoerhof. Reading the plain language of the agreement and in keeping with this Court's previous decision, although McManus-Zoerhof did not receive a 50 percent interest at the time of the initial transfer, it is nevertheless clear that she did in fact contract for an interest in the franchise, albeit one that was contingent in nature. By entering into the contract, McManus-Zoerhof gained a contingent interest in the franchise and she, like Toler, became obligated to pay McManus for the interest she received. *McManus*, unpub op at 10. She was, in other words, jointly indebted with Toler to McManus as a result of the 2002 writing.

Of course, following the 2002 agreement, there were other agreements between McManus-Zoerhof and Toler. However, as the panel explained in the previous decision, subsequent agreements between McManus-Zoerhof and Toler, to which McManus was not a party, could not alter his right to payment. Thus, regardless of what agreements later passed between Toler and McManus-Zoerhof, by virtue of the 2002 agreement, McManus-Zoerhof contractually bound herself to the obligation of paying McManus for her interest in the franchise.

Moreover, in addition to the 2002 written agreement, McManus-Zoerhof later negotiated payment terms with her father, contracting for a ten-year payment plan and a seven percent rate of interest. During these discussions, McManus-Zoerhof claimed full responsibility for half of the purchase price debt. Indeed, she specifically wanted her debt kept separate from Toler's and she insisted on specifying that payments were "per person." She began making payments simultaneously with Toler, with no indication that he alone owed the debt until she passed her licensing exams or that she was otherwise not obligated to McManus under the original terms of the contract. She in fact went on to make payments on the purchase price to McManus for several years, in an amount totaling more than $113,000. These payments continued even *after* the failure of her contingent interest. That is, after she failed to pass her licensing exams, she continued making payments on the debt to McManus, signifying that her debt to her father arose

from the purchase of her contingent interest under the original 2002 agreement. Given the 2002 written agreement and McManus-Zoerhof's long term payment thereon, it is disingenuous for McManus to suggest that McManus-Zoerhof cannot be classified as a debtor on the original contract. As a joint debtor with Toler on the original contract, McManus-Zoerhof's payments on the purchase price extinguished that debt in an amount equal to her payments, and she could not thereafter, without Toler's consent, retract those payments to have them applied to her own personal attorney fees. See *Thayer v Denton*, 4 Mich 192, 196-198 (1856).

Indeed, even if we were persuaded that McManus-Zoerhof had no contractual obligation to McManus under the original contract, it is readily apparent that, at the time she accepted half the business from Toler in 2004, she fully accepted responsibility for half the purchase price and she agreed that she would continue to make her payments to McManus. Thus, even if Toler bore sole financial responsibility to McManus under the original contract, in essence, Toler delegated his payment obligation on half the debt to McManus-Zoerhof in exchange for which she received half the business. McManus, having accepted McManus-Zoerhof's checks as payments on the purchase price, cannot now complain that Toler did not meet his obligation in regard to these sums. See *UAW-GM Human Res Ctr*, 228 Mich App at 510 ("[A]n obligor may discharge his duties under a contract by vicarious performance."). McManus-Zoerhof's payments, accepted by McManus as payment on the purchase price, extinguished that debt to the extent of those payments. See Restatement Contracts, 2d, § 278; 70 CJS Payment § 6. The debt, having been extinguished, cannot now be revived by McManus as against Toler. See 70 CJS Payment § 32. Consequently, the trial court properly credited Toler with the amounts paid by McManus-Zoerhof toward the purchase price in assessing Toler's outstanding debt to McManus.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro